No. 81201-2

SANDERS, J. (dissenting)—The majority acknowledges the State must prove a person is mentally ill and currently dangerous as a result thereof to commit the person as a sexually violent predator (SVP). Majority at 13. But the majority rejects Moore's argument "that the State was required to prove Moore would reoffend within the foreseeable future to establish he is currently dangerous," majority at 1, 13, and simply asserts, "[b]y properly finding a person to be an SVP, it is implied that the person is currently dangerous. We do not deem it necessary to impose on the State the additional burden that it prove the SVP will reoffend in the foreseeable future." Majority at 14. I disagree.

"The State may . . . confine a . . . person if it shows 'by clear and convincing evidence that the individual is mentally ill and dangerous.'" *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) (quoting *Jones v. United States*, 463 U.S. 354, 362, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983)). The State must establish an individual is mentally ill and the mental illness causes the individual to be currently dangerous. *Foucha*, 504 U.S. at 76. "The dangerousness must be current."

*In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). "[C]urrent" is "occurring in or belonging to the present time **:** in evidence or in operation at the time actually elapsing." Webster's Third New International Dictionary 557 (2002). A person "may be held as long as he is both mentally ill and dangerous, but no longer." *Foucha*, 504 U.S. at 77.

Moore argues due process requires the State to prove he is likely to reoffend within the reasonably foreseeable future to establish current dangerousness.

The Court of Appeals relied on *In re Detention of Wright*, 138 Wn. App. 582, 155 P.3d 945 (2007), which summarily relied on *In re Personal Restraint of Young*, 122 Wn.2d 1, 59, 857 P.2d 989 (1993), and held "Moore contends due process requires the State to prove that an incarcerated SVP candidate is likely to reoffend within the reasonably foreseeable future. This argument is controlled by our decision in *In re Detention of Wright*, 138 Wn. App. 582, 155 P.3d 945 (2007)." *In re Det. of Moore*, noted at 141 Wn. App. 1026, 2007 WL 3347797, at *5.

In *Young*, Young contended the State "should have to prove he was likely to commit another offense within a set time frame," but the court rejected this argument without directly addressing it, simply asserting it lacked merit without explanation. *Wright,* 138 Wn. App. at 585; *Young,* 122 Wn.2d at 59. However *Young* did not say the constitutional requirement to prove current dangerousness disappears.

In contrast a different Division One opinion persuasively reasoned, "the fact

that an individual is incarcerated on the day the petition is filed is not, by itself, dispositive. The more fundamental question is whether there is evidence of future dangerousness sufficient to overcome the individual's liberty interest." *In re Det. of Henrickson*, 92 Wn. App. 856, 863, 965 P.2d 1126 (1998), *aff'd,* 140 Wn.2d 686, 2 P.3d 473 (2000). The State moved for discretionary review by this court disputing the reasoning of the Court of Appeals decision. *Id*. at 690. However, this court did not address the Court of Appeals' reasoning but held, "when, at the time the petition is filed, an individual is incarcerated for a sexually violent offense, or for an act that itself would have constituted a recent overt act, due process does not require the State to prove a further overt act occurred between arrest and release from incarceration." *Id.* at 697. We did not say proving current dangerousness is not an essential element of constitutionally required proof.

There also must be a causal connection between an individual's diagnosed mental abnormality and his conduct which reflects "the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.'" *Kansas v. Crane*, 534 U.S. 407, 412, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)). Moore's expert argued Moore was mentally ill, but his illness did not cause him to commit sexually violent crimes, thus not making him

currently dangerous as a result of a mental disorder. Moore contended his actions were motivated by reasons other than paraphilia, asserting he wanted to have sex for the sake of having sex and not because he enjoyed forcing others to do so. The State argued Moore was mentally ill because he suffered from paraphilia involving nonconsenting sex, and Moore's mental illness caused him to be currently dangerous because of his propensity to engage in nonconsenting sex. However the State never presented evidence Moore *is* currently dangerous.

Since current dangerousness is the only constitutional basis for civilly committing anyone, the majority is incorrect to assert it is not "necessary to impose on the State the additional burden that it prove the SVP will not reoffend in the foreseeable future." Majority at 14. While it may be inappropriate to require evidence of a recent over act if the individual has been incarcerated since his last violent sex crime, there still must be proof in the State's case in chief that the person is presently dangerous as a result of a mental disorder to satisfy constitutional standards.

I do not agree with the majority's holding that "there was sufficient evidence for the court to find Moore more probably than not would engage in sexually violent acts if released unconditionally from detention on the SVP petition. Because the evidence was sufficient for such a finding, the court impliedly found Moore was currently dangerous." Majority at 16. The problem is that under these instructions the State is not required to prove Moore will reoffend in the near future to establish he is currently

dangerous, only that he is likely to reoffend sometime in his life. This is not proof of *current* dangerousness.

Accordingly, I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: